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APPENDIX A

29 U.S.C. Sec. 157. *Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a) (3) of this title. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Sec. 101, 61 Stat. 140."

29 U.S.C. Sec. 158(b)(4). *Unfair labor practices.*

"To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (D) forcing or requiring any employer to assign particular work to

employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."

". . . *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;"

29 U.S.C. Sec. 163. *Right to strike preserved.*

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations of qualifications on that right. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Sec. 101, 61 Stat. 151."

LABOR-MANAGEMENT RELATIONS ACT OF 1947, 61 Stat. 161, 162.

"Sec. 501(2). The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

"Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of

employment of such employee or employees be deemed a strike under this Act."

49 U.S.C. §316(d). *Undue preferences or prejudices prohibited.*

"All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

49 U.S.C. §316(e). *Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.*

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier

or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers, affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

49 U.S.C. §322(b). *Jurisdiction of district courts to restrain violations and enforce orders.*

If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such

court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

Kentucky Revised Statutes, Section 281.600. *Administrative Functions and Powers of the Department.*

"The Department of Motor Transportation shall exercise all administrative functions of the state in relations to motor transportation as defined in this chapter, and shall apply, as far as practical, the administrative and judicial interpretations of the Federal Motor Carrier Act. It shall have the right to regulate motor carriers as provided in this chapter, and to that end may establish reasonable requirements with respect to continuous and adequate service of transportation, systems of accounts, records and reports, preservation of records and safety of operation and equipment. It may issue subpoenas, subpoenas duces tecum, and orders of personal attendance for the attendance of witnesses, any proceeding before it, and permit the and protection of pertinent records, for taking of depositions, or in accord with the Civil Code of Practice, and it shall have the power to make such rules and regulations as it may deem necessary to carry out the provisions of this chapter."

Kentucky Revised Statutes, Section 281.610. *Regulation of Interstate Commerce.*

"(1) The provisions of this chapter shall apply to interstate commerce, except insofar as such application is in conflict with any provision of the Constitution of the United States or the Acts of Congress.

"(2) The Commissioner may grant a certificate of convenience and necessity for the transportation of persons or property for compensation in interstate commerce, and may regulate such interstate commerce under the authority of and in accordance with the provisions of any Act of Congress vesting in or dele-

gating to the Commissioner such authority as an agency of the United States Government. The Commissioner may notify the proper department of the Federal Government of his assent to the requirements and conditions of such Act of Congress in regard to interstate commerce by motor vehicle."

Kentucky Revised Statutes, Section 281.685. *Adherence to Rates, Fares, Charges and Schedules; Discrimination.*

"(1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons and property or for any services, in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the Department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination.

(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any services in connection therewith then that contained in the contract required to be filed with the Department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination."

APPENDIX B

Said Memorandum Opinion on Terms of Injunction filed in Court April 23, 1953, is as follows, to-wit:

JEFFERSON CIRCUIT COURT
CHANCERY BRANCH
SECOND DIVISION

THE AMERICAN TOBACCO COMPANY, INC., *Plaintiff.*

vs.

Memorandum Opinion on Terms of Injunction

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., is the authorized representative for the purpose of collective bargaining of employees of American Suppliers, Inc., *Defendants.*

The Court having authorized picketing of American Tobacco Company as well as American Suppliers, Inc., the plaintiff insisted that the temporary injunction heretofore issued requiring members of defendant union, who were also employees of common or contract carriers, to continue to make deliveries to the plaintiff without discrimination.

Plaintiff insists that the threatened action of the members of the union who are so employed to refuse to make deliveries to it is violative of K.R.S. 281.685 wherein a common carrier (similar provisions are also had for contract carriers) is enjoined against subjecting any unreasonable discrimination, and the penalty provisions of the same chapter, which in effect provide that any person who causes, aids or abetts any violation of the above is doing an unlawful act.

Counsel for the union insists that to require the members of the union to make these deliveries in spite of their contract agreement to the contrary would amount to in-

voluntary servitude and also a violation of the Taft-Hartley Act.

On the authority of the above mentioned provisions of the statute, and on the authority of these two cases considering similar statutes, *Burlington Transport Co. v. Hathaway,* 12 N.W. (2d) 167, an Iowa case, and *Turner v. Zanes,* 206 S. W. (2d) 144, a Texas case, the Court is of the opinion that appropriate language should be contained in the permanent injunction restraining any unlawful discrimination.

/s/ STUART E. LAMPE,
Judge.

COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 89, ET AL., *Appellants,*

vs.

THE AMERICAN TOBACCO COMPANY, INC., *Appellees.*

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge.

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the sake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and

a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic inter-dependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The

tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existent dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible

during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisditcion.

In the recent case of *Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky.*, 248 S.W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employees of the Martin Brown Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a

neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their *employees* must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, *in all the states.* Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990 (1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685 (1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In *Burlington Transp. Co. v. Hathaway (Iowa, 1943),* 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs,

warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to nondiscrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et. al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al., v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the

picket line. 13 C. J. S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

• • • • • • • •

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952)* 105 F. Supp. 794; *Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948)* 189 Pac. 2d 277; *Turner v. Zanes, (Tex., 1947)* 206 S. W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp. 1952), makes the question under discussion one exclusively controlled by the above enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), which is as follows: "• • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if

the employees of such employer are engaged in a strike ratified or approved by representative of such employees whom such employer is required to recognize under this sub-chapter."

We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech, Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful. The appeal here involves the refusal of employees of carriers who happen to belong to Local 89, the bargaining representatives of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the constitutional law and the statutory law of Kentucky. More than that, the illegal conduct of the employees could subject them to criminal prosecution. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States.

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without

discrimination existed long before the contract came into being, and, by like token, employees of common carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Where the common carrier and its employees seek by a contractural provision to avoid the responsibility imposed by statute, such a contractual provision is void. Such is the case here.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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As modified on its face on rehearing February 5, 1954, as reported at 264 S. W. 2d 250.

COURT OF APPEALS OF KENTUCKY

June 2, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 89, ET AL., *Appellants.*

vs.

THE AMERICAN TOBACCO COMPANY, INC., *Appellees.*

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge.

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

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of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery.

Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buy raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existant dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an em-

ployer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of *Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky.*, 248 S.W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employees of the Martin Brown Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor

can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685 (1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am.

Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In *Burlington Transp. Co. v. Hathaway (Iowa, 1943)*, 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to nondiscrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et al., C. C. 34 F. 481, and Consolidated Freight Lines, Inc., et al., v. Department of Public Service, et. al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers

operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. 13 C.J.S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry Co., C. C. 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

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"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952)* 105 F. Supp. 794; *Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948)* 189 Pac. 2d 277; *Turner v. Zanes, (Tex., 1947)* 206 S.W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was described, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151, et seq., (Supp. 1952), makes the question under discussion one exclusively controlled by this enactment. To fortify this position, reliance is had upon

this part of 29 U. S. C. A., Sec. 158, also known as 8(b)(4)(D) of the Act, which is as follows: "* * * provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee whom such employer is required to recognize under this sub-chapter."

The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See *Local Union No. 10 v. Graham*, 344 U. S. 811, and the cases cited therein. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.

Finally, the employees of the carriers rely upon a pro-

vision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of such carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Here the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by a statute which implements a constitutional provision, and we hold that such a contractual stipulation is void.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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APPENDIX C

Said Judgment entered in Court April 23, 1953, in Judgment Book 124, page 43 and 44, is as follows, to-wit:

JEFFERSON CIRCUIT COURT
CHANCERY BRANCH
SECOND DIVISION

THE AMERICAN TOBACCO COMPANY, INC., *Plaintiff.*

vs.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., an unincorporated labor union, et al., *Defendants.*

Judgment

At a court held on April 22, 1953:

The Court, having considered the entire record herein, heard proof offered by both parties in open court, and considered further proof offered by affidavits and exhibits, and arguments of counsel, and being advised, rendered a written opinion on April 21, 1953, which is hereby made part of the record,

And the parties agreeing that the order heretofore issued herein on April 6, 1953, and denominated a "Restraining Order," having been issued upon notice and after hearing; may be considered a temporary injunction rather than a restraining order for all purposes of this action,

And the parties further agreeing that all the proof herein, including affidavits, may be considered by the Court as evidence upon the plaintiff's motion for a permanent injunction, as well as upon its motion for a temporary injunction and defendants' motion to dissolve the same, both of which agreements are hereby made a part of the record herein,

And the Court being of the opinion that the said temporary injunction, presently in effect should be modified, and a permanent injunction issued in lieu thereof, upon the terms hereinafter set out, and plaintiff and defendants all having advised the Court, as is now and hereby certified, that each of them desires to appeal to the Court of Appeals from the judgment modifying said temporary injunction and granting said permanent injunction,

It Is Ordered, that the temporary injunction heretofore in effect may be and hereby it is, modified and made into a permanent injunction, upon the following terms:

PERMANENT INJUNCTION

That the defendants, General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, and all members of said unincorporated labor union, and their confederates and associates, may be and hereby they are permanently enjoined:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets at or about plaintiff's premises in excess of three pickets on each side (North, East, South, and West) plus one picket captain, making a maximum of thirteen persons at or about plaintiff's premises and within two hundred (200 feet thereof at any time);

2. From causing or threatening injury to the persons or property of the employees of plaintiff, or the physical property of plaintiff;

3. From using abusive, vile, profane, or threatening lan-

guage to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers.

Provided, however, that for a period of twenty days from this date, to-wit, until May 12, 1953, at 5:00 o'clock P. M., or such earlier time as the Court of Appeals may order otherwise, the temporary injunction aforesaid of April 6, 1953, may be and hereby it is continued in force upon its original terms, and the terms of this permanent injunction shall be and become binding upon the dissolution or modification of said temporary injunction, unless the Court of Appeals shall order otherwise.

So long as said temporary injunction remains in force, the bond heretofore given by plaintiff herein shall remain in effect. To all of which the Plaintiff and Defendants object and except and pray in appeal to the Court of Appeals which is hereby granted.

/s/ STUART E. LAMPE,
Judge.

/s/ STITES, WOOD, HELM & TAYLOR,
Counsel for Plaintiff.
/s/ HARDY & LOGAN,
Counsel for Defendants.

APPENDIX C

Supreme Court of the United States

No. .....

OCTOBER TERM, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, etc., et al.,
Petitioners.

vs.

THE AMERICAN TOBACCO COMPANY, INC.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 3, 1954.

/s/ Stanley Reed,
Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of April, 1954.